JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Thu Jul 24 13:47:49 2014

Mamadou Cire Magassouba v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05–33–02 OF 2012
BALIA YUSOF, MOHTARUDIN BAKI AND TENGKU MAIMUN JJCA
28 MARCH 2014

Criminal Law — Dangerous Drugs Act 1952 — Double presumption — Whether rule against invocation of double presumption breached — Whether presumption of possession under s 37(d) of the Dangerous Drugs Act 1952 ('DDA') unrebutted — Whether manner accused trafficked in drugs fell within s 2 of the DDA — Whether adverse inference should be invoked against prosecution for not calling person arrested together with accused at material time — Whether person so arrested was material witness and evidence was suppressed

The appellant, a national of the Republic of Guinea, was convicted and sentenced to death by the High Court on a charge of trafficking in 10,886g of cannabis which was in a locked bag the appellant was pulling when he was arrested by police at a bus station in Jitra, Kedah. A key which opened the bag was found in the appellant's wallet when a search on his person was made. At the trial court, the appellant denied he was pulling the bag at the material time and said the bag belonged to a Nigerian named Ejike whom he met while taking a taxi and who was arrested together with him at the bus station. Ejike was initially charged together with the appellant but was released before the trial began. He was not called by the prosecution to testify. Among the grounds raised in the instant appeal against conviction and sentence was that: (i) the trial judge erred in not invoking adverse inference against the prosecution under s 114(g) of the Evidence Act 1950 on its failure to call Ejike; (ii) the prosecution failed to prove the appellant had possession of the drugs because two prosecution witnesses, SP2 and SP5, conflicted in their description of the person who was pulling the bag at the material time, and (iii) the trial court had breached the rule against the invocation of double presumption under the Dangerous Drugs Act 1952 ('DDA').

Held, dismissing the appeal and affirming the conviction and sentence:

(1) Ejike was not a material witness given that the trial judge found that it was the appellant who was pulling the bag at the material time. There was also no suppression of evidence as efforts were made to trace Ejike but they were in vain. The invocation of adverse inference was warranted only if there was failure to call a material witness and if there was suppression of evidence (see para 16).

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Thu Jul 24 13:47:49 2014

(2) The trial judge had considered the discrepancy in the evidence of SP2 and SP5 concerning the description of the person who was pulling the bag. The trial judge found the discrepancy to be the result of individual perception and not material. Notwithstanding that discrepancy, both the witnesses had positively identified that it was the appellant who was pulling the bag. The trial judge therefore did not err in finding it was the appellant who was pulling the bag containing the drugs (see paras 8–9).

(3) The trial judge had found possession against the appellant under s 37(d) of the DDA and trafficking under s 2 of the Act. There was thus no breach of the rule against double presumption (see para 18).

[Bahasa Malaysia summary

Perayu, rakyat Republik Guinea, disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi atas tuduhan mengedar 10,886g kanabis yang mana berada dalam beg yang dikunci yang ditarik oleh perayu apabila dia ditangkap oleh polis di stesyen bas di Jitra, Kedah. Kunci yang boleh membuka beg tersebut dijumpai di dalam dompet perayu apabila carian badan ke atasnya dibuat. Di mahkamah perbicaraan, perayu menafikan dia menarik beg pada masa material dan menyatakan beg tersebut adalah kepunyaan seorang rakyat Nigeria yang bernama Ejike yang ditemuinya semasa menaiki teksi dan orang yang ditangkap bersama dengannya di stesyen bas tersebut. Ejike pada mulanya dituduh bersama dengan perayu tetapi dilepaskan sebelum perbicaraan bermula. Dia tidak dipanggil oleh pihak pendakwaan untuk memberi keterangan. Antara alasan-alasan yang dibangkitkan di dalam rayuan ini terhadap sabitan dan hukuman adalah bahawa: (i) hakim bicara terkhilaf dalam tidak membangkitkan inferens bertentangan terhadap pihak pendakwaan di bawah s 114(g) Akta Keterangan 1950 atas kegagalannya untuk memanggil Ejike; (ii) pihak pendakwaan gagal untuk membuktikan perayu mempunyai milikan dadah kerana dua saksi pendakwaan, SP2 dan SP5, bercanggah dalam deskripsi mereka mengenai orang yang menarik beg pada masa material, dan (iii) mahkamah perbicaraan telah memungkiri peraturan terhadap pembangkitan anggapan berganda di bawah Akta Dadah Berbahaya 1952 ('ADB').

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Ejike adalah bukan saksi material kerana hakim bicara mendapati bahawa perayulah yang menarik beg pada masa material. Juga tidak terdapat penyembunyian keterangan kerana usaha telah dibuat untuk menjejak Ejike tetapi semuanya sia-sia. Pembangkitan inferens bertentangan adalah wajar hanya jika terdapat kegagalan untuk memanggil saksi material dan juga penyembunyian keterangan (lihat perenggan 16).

(2) Hakim bicara telah mempertimbangkan percanggahan dalam

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Thu Jul 24 13:47:49 2014

keterangan SP2 dan SP5 berkenaan deskripsi orang yang menarik beg. Hakim perbicaraan mendapati percanggahan adalah akibat persepsi perseorangan dan bukan material. Meskipun percanggahan tersebut, kedua-dua saksi telah secara positif mengenal pasti bahawa perayu yang menarik beg tersebut. Hakim bicara oleh itu tidak terkhilaf dalam mendapati bahawa perayu yang menarik beg yang mengandungi dadah tersebut (lihat perenggan 8–9).

(3) Hakim bicara telah mendapati milikan terhadap perayu di bawah s 37(d) ADB dan mengedar di bawah s 2 Akta yang sama. Oleh itu tidak terdapat pelanggaran peraturan anggapan berganda (lihat perenggan 18).]

Cases referred to

Hasbala Mohd Sarong v PP [2013] 6 MLJ 636; [2013] 6 CLJ 945, FC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (folld)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), 39B(2)
Evidence Act 1950 s 114(g)

Appeal from: Criminal Trial No 45A-26–06 of 2011 (High Court, Alor Setar)

Burhanudeen bin Abdul Wahid (Burhan & Co) for the appellant.
Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] The appellant was charged for trafficking in 10,886g of cannabis, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act').

[2] The appellant was arrested with another person, Ejike Thankgod, on 14 September 2010 upon surveillance being laid by the police at bus station Changloon, Jitra, Kedah. It was the case for the prosecution that when the appellant and Ejike were apprehended, the appellant was pulling a bag which was locked. Upon arrest and upon searching the appellant, SP2 found a 'crocodile' wallet in the pocket of the appellant's trousers and inside the wallet, SP2 found a key. With the said key, SP2 opened the bag. Twelve slabs were recovered from the bag which was later confirmed by the chemist (SP3) to be 10,886g of cannabis.

[3] At the end of the prosecution's case, the learned trial judge found that a prima facie case had been made out. The appellant was called upon to enter his

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Thu Jul 24 13:47:49 2014

defence. The appellant gave evidence on oath. He denied that he was carrying any bag. His evidence was that he took a taxi from the Thailand-Malaysia border and that he met Ejike, whom he never knew before, in the taxi. The appellant said that the bag belonged to Ejike. The appellant also denied any knowledge of the key to the bag. Although he corroborated the prosecution's version that a wallet was recovered from his trouser's pocket and that the key dropped when the police was inspecting the wallet, the appellant denied any knowledge of the key.

[4] The learned trial judge found that the defence has failed to raise a reasonable doubt on the prosecution's case. The appellant was thus convicted and sentenced to death.

THE APPEAL

[5] Learned counsel for the appellant raised the following grounds of appeal:

(a) possession and knowledge of the drugs was not proven;

(b) the identity of the drugs exhibit was in doubt;

(c) no proper evaluation of the prosecution evidence; and

(d) the defence was not properly considered.

In the alternative, learned counsel raised the issue of the invocation of double presumption by the learned trial judge.

[6] The issue of possession and knowledge is tied to Ejike, who was initially charged together with the appellant, but was released before the commencement of the trial. Ejike was not called by the prosecution to give evidence. It was the submission of learned counsel that the prosecution has failed to prove possession in the light of the contradiction in the evidence of SP2 and SP5 as to the description of the person who was pulling the bag and further, the key was not listed in the search list of the appellant.

[7] SP2 said the person pulling the bag was 'kurus tinggi' while SP5 said ... yang rendah sedikit menarik beg ... manakala yang satu lagi Ejike tinggi ... Without Ejike, learned counsel submitted that the court would not be in the position to know who is 'kurus tinggi' and 'kurus rendah'.

[8] We find that the learned trial judge had considered the discrepancy in the evidence of SP2 and SP5 in making his finding that it was the appellant who was pulling the bag. The learned trial judge said:

[8] ... Dari keterangan saksi-saksi pendakwa, dua warga Afrika yang ditangkap pada

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Thu Jul 24 13:47:49 2014

hari tersebut adalah OKT dan seorang lagi bernama Ejike Thankgod. OKT seorang warga Negara Republik Guinea sementara Ejike seorang warga Negara Nigeria. Kedua-dua saksi, SP2 dan SP5 memberi keterangan OKT adalah orang yang menarik beg tersebut pada masa ditahan. SP2 memberi gambaran OKT yang menarik beg tersebut sebagai seorang yang berbadan kurus dan tinggi. Ejike pula telah digambarkan oleh SP2 sebagai seorang yang berbadan besar sedikit dari OKT. Keterangan ini jelas dilihat semasa pemeriksaan utama dan semasa pemeriksaan semula. Semasa pemeriksaan balas SP2 telah dicadangkan bahawa bukan OKT yang menarik beg tersebut, sebaliknya Ejike yang berbadan kurus dan tinggi sama seperti OKT yang menarik beg tersebut. SP2 tidak bersetuju dengan cadangan tersebut.

[9] SP5 pula, semasa di dalam pemeriksaan utama memberi gambaran Mamadou (OKT), orang yang menarik beg tersebut sebagai seorang yang berbadan agak rendah sedikit berbanding Ejike. OKT juga digambar sebagai seorang yang kurus dan rendah dan perkara ini diulangi semasa pemeriksaan balas. Ejike digambarkan oleh SP5 sebagai seorang yang kurus dan tinggi.

[10] ... Persoalan siapa yang menarik beg tersebut akan menentukan siapa yang mempunyai pemilikan ke atas beg dan isi kandungannya. ... Selepas meneliti keterangan SP2 dan SP5 ini saya dapati terdapat sedikit percanggahan di dalam keterangan mereka tentang saiz orang yang telah menarik beg tersebut. Bagaimana pun saya dapati percanggahan ini terlalu kecil. Kedua-dua saksi ini secara positif telah mengenal pasti OKT sebagai orang yang menarik beg tersebut. Percanggahan yang wujud di dalam keterangan mereka hanyalah tentang gambaran yang dibuat oleh kedua-dua saksi tentang saiz badan OKT dan Ejike. SP2 menggambarkan OKT sebagai seorang yang kurus dan tinggi. Beliau tidak membuat perbandingan tinggi rendah OKT dan Ejike. SP5 pula menggambarkan OKT berbadan agak rendah berbanding Ejike. Jelasnya SP5 semasa memberi gambaran tersebut membuat perbandingan tinggi rendah di antara OKT dan Ejike sementara SP2 tidak membuat perbandingan, sekadar memberi gambaran OKT seorang yang kurus dan tinggi. Seseorang boleh memberi gambaran berbeza tentang tinggi rendah seorang lain kerana itu hanya persepsi seseorang.

[11] Apa yang jelas percanggahan ini adalah percanggahan yang kecil pada gambaran saiz orang yang menarik beg, di antara OKT dan Ejike. Walau pun begitu kedua-dua saksi mengenalpasti secara positif OKT sebagai orang yang menarik beg tersebut. Percanggahan yang kecil sebegini tidak menjadikan keterangan mereka tidak boleh dipercayai (lihat *Public Prosecutor v Datuk Haji Harun Idris (No 2)* [1977] 1 MLJ 15).

[9] As found by the learned trial judge, notwithstanding the discrepancy in the description given by SP2 and SP5 as to the person who was pulling the bag, the appellant was positively identified by both SP2 and SP5. In the circumstances, we find that the learned trial judge had not erred in finding the appellant as the person pulling the bag containing the drugs.

[10] There was also the issue of the recovery of the padlock and the key to the padlock which was not mentioned in the search list of the appellant (exh P5).

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Thu Jul 24 13:47:49 2014

The padlock and the key were however listed in the 'senarai barang kes diserah' (exh P6) from SP2 to the investigating officer ('SP6'). SP2 confirmed that he seized the padlock and the key and he gave an explanation for the omission to state the padlock and the key in the search list. His explanation was that 'Dalam borang bongkar saya terlupa masukkan satu mangga dan anak kunci'.

[11] The defence challenged the version by the prosecution that the key was found in the appellant's wallet. In this respect the learned trial judge accepted the evidence of the prosecution witnesses that the key was recovered from the appellant. We find no reason to disturb the finding of the learned trial judge. We therefore find that the issue on possession and knowledge raised by learned counsel to be without merit.

[12] On the identity of the drugs exhibit, learned counsel submitted that there was a doubt as to whether the drugs sent to SP3 for analysis and that were subsequently tendered in court were the drugs seized by SP2. The issue was in relation to:

(a) the gross weight of the drugs which were stated by SP2 as 11,650g whereas SP3 found the gross weight to be 11,292.9g

(b) the incision made by SP2 on the slabs; and

(c) the finger dusting.

[13] It was thus the submission of learned counsel that this case concerned not just the issue of discrepancy of the weight but also the identity of the drugs itself. Learned counsel submitted that there was contradiction in the evidence of SP2, SP6 and SP3 in respect of the identity of the drugs. SP2 said that he made an incision to the slabs to look at the contents thereof. SP6 said when he received the 12 slabs, 'telah ada kesan dusting dan setiap ketulan dadah disyaki ganja terdapat torehan.' Whilst SP3 gave the following evidence:

Q: Setiap bungkusan plastik yang kamu periksa, ada terdapat kesan usikan, koyakan dan sebagainya?

A: Tak ingat, sebab saya tak buat sebarang catitan.

[14] The fact that SP3 could not remember seeing any incision does not mean that there was contradiction in the evidence on the identity of the drugs. Having gone through the record of appeal, we are satisfied that the drugs exhibit tendered in court were the same exhibits seized from the appellant and sent to the chemist for analysis. We say so for the reason that the exhibits were identified by SP2 who had made the markings C1-C12 and had put his signature and date 14 September 2010 on the plastic packaging of the slabs. SP6, the investigating officer confirmed that he received 12 slabs marked C1-C12 with the signature of SP2 and the date 1 September 2010. The

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Thu Jul 24 13:47:49 2014

chemist SP3 had also confirmed receiving from SP6 the drugs exhibit marked C1-C12 for analysis. The issue on the difference in the gross weight has been settled by the Federal Court in *Hasbala Mohd Sarong v Public Prosecutor* [2013] 6 MLJ 636; [2013] 6 CLJ 945. The ground raised by learned counsel on the issue of exhibits must necessarily fail.

[15] The other issue canvassed by learned counsel was that the learned trial judge had failed to draw an adverse inference under s 114(g) of the Evidence Act 1950 in respect of the failure by the prosecution to call Ejike as a witness and that the learned trial judge had failed to properly consider the defence.

[16] As for the non-calling of Ejike, s 114(g) applies not merely for the failure to call any witness but a material witness and that it is only when the prosecution suppressed the evidence that it warrants the invocation of an adverse inference (see *Munusamy v Public Prosecutor* [1987] 1 MLJ 492). In the instant case, we do not see how Ejike is a material witness given that the learned trial judge had found that it was the appellant who was pulling the bag. Further, there was no suppression of evidence as efforts were made to trace Ejike but that the efforts failed.

[17] Insofar as the defence is concerned, we find that the learned trial judge had given proper and sufficient consideration of the same before coming to the conclusion that the defence failed to raise a reasonable doubt on the prosecution's case. For convenience, we reproduce the relevant part of the grounds of judgment of the learned trial judge:

> [24] ... Pembelaan OKT ialah beg itu sebenarnya telah ditarik oleh Ejike. Pembelaan OKT juge menafikan kunci telah dijumpai dari dalam wallet beliau sebaliknya kunci tersebut terjatuh dari gumpulan wang kertas yang dikeluarkan dari poket seluar Ejike. Keterangan pembelaan ini sama sekali menyanggah keterangan saksi pendakwa yang mengatakan OKT sedang menarik beg tersebut. Saya telah katakan keterangan SP2 dan SP5 tentang saiz orang yang menarik beg tersebut sedikit bercanggah dan percanggahan di antara keterangan ini, telah saya putuskan sebagai percanggahan diskripsi saiz orang yang menarik beg tersebut sahaja memandangkan SP2 memberi diskripsi yang berbeza dari SP5 tentang saiz orang tersebut. Percanggahan ini sebenarnya tidak melibatkan identiti orang tersebut. Jika diteliti secara halus keterangan mereka ini kedua-duanya secara positif mengenal pasti OKT yang menarik beg tersebut. ...
>
> [25] ...
>
> [26] Pembelaan OKT juga menimbulkan cerita kunci yang dijumpai oleh SP2 sebenarnya tidak dijumpai dari dalam wallet beliau; yang dikeluarkan dari dalam poket seluar beliau. Apa yang OKT katakan oleh OKT ialah kunci tersebut terjatuh dari gumpulan dan lipatan wang kertas yang telah dikeluarkan oleh SP2 dari poket seluar Ejike. Perkara ini dinafikan oleh SP2 dan SP5 semasa mereka diperiksa balas. Jika pun keterangan pembelaaan OKT diterima saya dapati sebenarnya OKT sendiri tidak dapat mengatakan anak kunci tersebut jatuh dari dalam gumpulan

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Thu Jul 24 13:47:49 2014

wang tersebut. Jika keterangan OKT diterima, dapat dilihat dari keterangan pembelaan beliau bahawa polis terlebih dahulu mengeluarkan gumpulan dan lipatan wang kertas tersebut dan meletakkan di dalam tangannya. Pada masa itu tidak ada apa-apa yang terjatuh dari gumpulan wang tersebut. Kemudian apabila wallet OKT dikeluarkan dan diletakkan di atas gumpalan atau lipatan wang kertas barulah anak kunci terjatuh. OKT sendiri tidak tahu dari mana anak kunci tersebut terjatuh. OKT sekadar buat anggapan anak kunci tersebut terjatuh dari gumpulan atau lipatan wang kertas tersebt.

[18] Learned counsel for the appellant had also raised the issue of double presumption. Having perused the grounds of judgment, we find that the learned trial judge had found possession under s 37(d) and trafficking under s 2 of the Act. There was thus no breach by the learned trial judge of the principle of double presumption as set out in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170.

[19] In light of all the above, we find no appealable error on the part of the learned trial judge. We are of the view that the conviction of the appellant is safe. We unanimously dismissed the appeal and affirmed the conviction and sentence imposed by the High Court.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar